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February 13, 2004

2004. 44-C

Via Hand Delivery
Mr. Bruce F. Duke
Deputy Executive Commissioner
South Carolina Public Service Commission
101 Executive Drive
Columbia, SC 29211

Re: ***Petition of Level 3 Communications, LLC For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and Pursuant to S.C.Code Ann. § 58-9-280(D)(1976, as amended) for Rates, Terms, and Conditions with Bellsouth Telecommunications Inc.***

Dear Mr. Duke:

Level 3 Communications, LLC ("Level 3") encloses for filing an original and sixteen copies of its Petition for Arbitration in the above-captioned matter. An extra copy of the Petition for Arbitration is also enclosed. I would appreciate your date-stamping the extra copy and returning it to my courier.

By copy of this letter, I am also serving BellSouth's local counsel with the Petition. Please do not hesitate to contact me should you have any questions.

Very truly yours,

Faye A. Flowers

Faye A. Flowers

Enclosures

cc: Patrick Turner, Esquire

Petition of LEVEL 3 COMMUNICATIONS, LLC
For Arbitration Pursuant to Section 252(b)
of the Communications Act of 1934, as
amended by the Telecommunications Act of 1996,
and Pursuant to S.C.Code Ann. § 58-9-280(D)(1976, as amended)
for Rates, Terms, and Conditions
with Bellsouth Telecommunications Inc.

I. **Letter of Filing**

II. **Level 3 Communications, LLC's Petition for Arbitration**

III. **Exhibit A – Interconnection Request Letter**

IV. **Exhibit B – Proposed Interconnection Agreement**

V. **Exhibit C – Existing Agreement Excerpts and Dec. 24, 2003 Amendment**

BEFORE THE
SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Petition of	)	
	)	
LEVEL 3 COMMUNICATIONS, LLC	)	Docket No. _____
	)	
For Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and Pursuant to S.C.Code Ann. § 58-9-280(D) (1976, as amended) for Rates, Terms, and Conditions with BellSouth Telecommunications, Inc.	)	

PETITION FOR ARBITRATION

Level 3 Communications, LLC ("Level 3"), pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(b), and S.C.Code Ann. § 58-9-280(D)(1976, as amended) petitions the South Carolina Public Service Commission ("Commission") for arbitration of the unresolved issues arising out of the interconnection negotiations between Level 3 and BellSouth Telecommunications, Inc. ("BellSouth") (collectively, the "Parties"). Level 3 requests that the Commission resolve each of the issues identified in this Petition by ordering the Parties to incorporate Level 3's position into an interconnection agreement. In support of this Petition, Level 3 states as follows:

I. THE PARTIES

1. Level 3 is a facilities-based competitive local exchange carrier ("CLEC"). Level 3 is a Delaware limited liability company with its principal place of business at 1025 Eldorado Boulevard, Broomfield, Colorado, 80021. Level 3 is authorized to provide all forms of switched

and dedicated telecommunications service on a resale and facilities-based basis in the State of South Carolina.[1]

2. All correspondence, notices, inquiries, and orders regarding this Petition should be served on the following individuals:

Richard E. Thayer, Esquire
Director – Intercarrier Policy
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, CO 80025
(720)-888-2620 (Tel)
(720) 888-5134 (Fax)
rick.thayer@level3.com

and

Faye A. Flowers, Esquire
Parker Poe Adams & Bernstein, LLP
1201 Main Street, Suite 1450 (29201)
Post Office Box 1509
Columbia, South Carolina 29202
(803) 255-8000 (Tel)
(803) 255-8017 (Fax)
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and

Henry C. Campen, Jr., Esquire
Parker Poe Adams & Bernstein, LLP
1400 Wachovia Capitol Center
Raleigh, North Carolina 27602-0389
(919) 828-0564 (Tel)
(919) 834-4564 (Fax)
henrycampen@parkerpoe.com

[1] See, Commission Order No. 1998-855 issued in Docket No. 1998-0353-C.

3. BellSouth is an incumbent local exchange carrier ("ILEC") for portions of the State of South Carolina. Within this operating territory, BellSouth has at all relevant times been an ILEC as that term is defined in Section 251(h) of the Act, 47 U.S.C. § 251(h).

4. During the negotiations with BellSouth, the primary contacts for BellSouth have been:

Michael D. Karno, Attorney
675 W. Peachtree Street, NE
Atlanta, GA 30375
Telephone: 404-335-0764
Fax: 404-614-4645
Michael.Karno@BellSouth.com

and

John M. Hamman
Manager-BellSouth Interconnection Services
Room 34S91
675 W. Peachtree Street, NE
Atlanta, GA 30375
Telephone: 404-927-1992
Fax: 404-529-7839
John.Hamman@BellSouth.com
iPage: JohnHamman@imcingular.com

II. THE INTERCONNECTION NEGOTIATIONS AND RESOLVED ISSUES

5. Level 3 and BellSouth began negotiations toward a successor agreement on **September 6, 2003**. A copy of the letter memorializing the starting date of negotiations is attached as Exhibit A. The arbitration window opened on **January 19, 2004** and closes **February 13, 2004**. This Petition is timely filed within the arbitration window. In an effort to reach a mutually agreeable successor to their expiring interconnection agreement, Level 3 and BellSouth have negotiated in good faith on numerous occasions and exchanged correspondence with respect to the proposed contract. While the Parties have reached agreement on many provisions of the contract, some issues remain in dispute. The Parties have not resolved many

differences over contract language and policy issues, some of them substantial and critical to Level 3's business plans, some of them important to ensure that the agreement is commercially reasonable and in compliance with applicable law, and some of them textual and definitional clarifications and reconciliations. Thus, Level 3 seeks arbitration of the remaining disputes with BellSouth. Level 3 will continue negotiating with BellSouth in good faith after this Petition is filed, and hopes that many of these issues can be resolved prior to any arbitration hearing. To facilitate resolution of these issues, Level 3 will participate in Commission-led mediation sessions, if available.

6. Level 3 has attached hereto as Exhibit B the interconnection agreement with the comprehensive redlines showing those matters that are at issue here. The agreement includes both the outstanding unresolved issues and the many new contract provisions on which the Parties have already reached agreement. Text appearing in Exhibit B in normal type represents those matters on which Level 3 understands the Parties to be in agreement.[2] The bold text in Exhibit B represents Level 3's proposals; the bold, italicized text represents Bellsouth's proposed language.

7. The Parties have resolved all issues and negotiated contract language to govern the Parties' relationship with respect to collocation, numbering, disaster recovery, rights-of-way, performance measurements, and pre-ordering, ordering, provisioning, maintenance and repair. These negotiated portions of the Agreement are included in Exhibit B. Except for the dispute concerning rates for ordering charges for interconnection facilities and the exchange of Section 251(b)(5) traffic (Enhanced Applications Traffic as defined herein) and ISP-bound Traffic, the

[2] To the extent that BellSouth asserts in any response that any of the matters that Level 3 understands to be and has identified as resolved are in fact open issues, Level 3 reserves the right to present its position with respect to such matters as part of this arbitration.

Parties have also agreed to the rates BellSouth generally offers all competitive local exchange carriers.[3]

III. JURISDICTION

8. Under the Act, parties negotiating for interconnection, access to unbundled network elements, or resale of services within a particular state may petition the state commission for arbitration of any unresolved issues during the 135th to the 160th day of such negotiations. 47 U.S.C. § 252(b). The statutorily prescribed period for arbitration expires on **February 13, 2004**. Accordingly, Level 3 files this Petition with the Commission on this date to preserve its rights under Section 252(b) of the Act and to seek relief from the Commission in resolving the outstanding disputes between the Parties. Pursuant to Section 252(b)(4)(C) of the Act, this arbitration is to be concluded on or about **June 6, 2004.**

IV. APPLICABLE LEGAL STANDARDS

9. This arbitration must be resolved under the standards established in Sections 251 and 252 of the Act, the rules adopted and orders issued by the Federal Communications Commission ("FCC") in implementing the Act, and the applicable rules and orders of this Commission. Section 252 of the Act requires that a state commission resolving open issues through arbitration:

> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [FCC] pursuant to section 251; [and]
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) [of section 252].

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[3] Level 3 has accepted the BellSouth-proposed rates on the basis of BellSouth's representation that these rates are the rates generally offered to all competitive LECs and consistent with the Commission's orders approving BellSouth's rates. To the extent Level 3 determines that the rates are not those generally offered to other competitive LECs, or are inconsistent with the rates ordered by this Commission, Level 3 reserves its right to contest such rates.

10. The Commission should make an affirmative finding that the rates, terms, and conditions that it prescribes in this arbitration proceeding are consistent with the requirements of Sections 251(b) and (c) and 252(d) of the Act.

V. UNRESOLVED ISSUES

This section of the Petition is divided into three sections. The first section summarizes the most substantive, critical business issues that Level 3 categorizes as "Tier I Issues." The second section summarizes the remaining substantive issues that must be resolved in order for the agreement to be consistent with applicable law, commercially reasonable, and certain in effect. Level 3 categorizes these issues as "Tier II Issues." For the Tier I and II Issues, Level 3 provides: (i) a list of the unresolved issues, referencing the section numbers in Exhibit B hereto for each provision at issue; (ii) a summary of what Level 3 understands to be each Party's position with respect to each such issue (where known), including, where applicable, a statement of the last offer made by each Party; and (iii) a brief statement for each issue describing the legal and/or factual basis supporting Level 3's proposed resolution and the conditions necessary to achieve the proposed resolution. Finally, Level 3 summarizes those issues in the Agreement that must be reconciled so that the Agreement is clear, consistent, commercially reasonable and consistent with applicable law. For these "Tier III Issues," Level 3 references the section numbers in Exhibit B hereto for each provision at issue and briefly summarizes each Party's position.

A. TIER I ISSUES

In this section of its Petition, Level 3 asks the Commission to provide operating certainty concerning the exchange of certain traffic between two common carriers, BellSouth and Level 3. These important operational issues relate to whether BellSouth can shift its originating transport obligations to Level 3 and how the Parties will compensate each other for the exchange of traffic.

The FCC "rules of the road" for interconnection permit Level 3 to select a single interconnection point per Local Access and Transport Area ("LATA") and require BellSouth to deliver traffic originated by its customers to that interconnection point at no charge to Level 3.[4] While BellSouth has nominally agreed to a single interconnection point per LATA, its "agreement" is really a fig leaf that cannot hide its attempts to escape its originating transport responsibilities. Throughout Attachment 3, BellSouth seeks to undermine this "agreement" by imposing costs on Level 3 for transporting traffic that is originated by BellSouth's customers to the interconnection point. BellSouth also seeks to avoid its obligation to compensate Level 3 for terminating traffic originated by BellSouth's customers. Although these aspects of interconnection and intercarrier compensation are well-settled law, BellSouth nevertheless seeks

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[4] *See, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, at ¶¶ 1042, 1062 (1996) ("*Local Competition Order*"); *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, at ¶ 78 (rel. Jun. 30, 2000) ("*Texas 271*"); *TSR Wireless, LLC et al. v. U S West Communications, Inc., et al.*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, Memorandum Opinion and Order (rel. Jun. 21, 2000) ("*TSR Wireless*"), *aff'd, Qwest Corp. et al. v. FCC et al,* 252 F.3d 462 (D.C. Cir. 2001); *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, at ¶¶ 72, 112 (rel. April 27, 2001) ("*Intercarrier Compensation NPRM*"); *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, at ¶ 52 (Wireline Comp. Bureau, rel. July 17, 2002) ("*Federal Arbitration Order*"). Five federal Circuit Courts of Appeals, including the Fourth Circuit which governs South Carolina have also upheld the FCC's "rules of the road" for interconnection. *Mountain Comms. Inc. v. F.C.C.*, No. 02-1255 slip op. at 10 (D.C. Cir. Jan. 16, 2004) (holding that FCC decision requiring CLEC to pay for transporting ILEC traffic to a single POI was arbitrary and capricious in that it directly contradicted, without explanation, prior FCC decision that ILEC could not charge for delivering traffic to single POI); *Southwestern Bell Tel. Co. v. Pub. Utils. Comm'n of Tex.*, 348 F.3d 482, 485 (5th Cir. 2003) (affirming lower court grant of summary judgment that CLEC may choose any technically feasible point for interconnection and may not be charged for delivery of ILEC traffic to that POI); *MCI Metro Access Transmission Servs., Inc. v. BellSouth Telecomms., Inc.*, No. 03-1238 Slip Op. at 14 (4th Cir. 2003) (reversing lower court grant of summary judgment for ILEC, finding that district court erred in concluding that the ILEC could charge the CLEC for the cost of transporting local calls originating on the ILEC network, as FCC rules unequivocally prohibit such charges and allowed no exceptions); *MCI Telecomms. Corp. v. Bell Atl. – Pa.*, 271 F.3d 491, 517 (3rd Cir. 2001) (holding that a state commission may not require CLEC to interconnect at other than the CLEC selected, technically feasible point, stating that to require otherwise "would be inconsistent with the policy behind the Act."); *US West Comms. V. MFS Intelenet, Inc.*, 193 F.3d 1112, 1124 (9th Cir. 1999) (affirming lower court decision permitting single point of interconnection).

to avoid the law and impose unlawful and unwarranted costs on its competitor, Level 3. Level 3 therefore seeks Commission arbitration to affirm its rights under federal law.

ISSUE ONE: Originating Transport Responsibility

Statement of the Issue: Is each Party required to bear financial responsibility for delivering its originating traffic to the interconnection point selected by Level 3?

Applicable Contract Provisions: Attachment 3, Sections 3.3.3, 4.3, 4.7.

Level 3's Position

Yes. Each Party is financially responsible for delivering its originating traffic to the interconnection point selected by Level 3.

BellSouth's Position

No. If the Parties establish a single interconnection point in a LATA, Level 3 must bear the cost of delivering traffic originated by BellSouth's customers and carried over BellSouth's network to the single interconnection point. Moreover, Level 3 must pay access tariff, not Section 252(d) cost-based, rates for ordering charges related to the BellSouth facilities used to carry BellSouth's originating traffic to the interconnection point.

Basis for Level 3's Position

Level 3's proposal to resolve Issue 1 is consistent with federal statutes, FCC regulations and federal circuit court case law interpreting such laws and regulations. The FCC "rules of the road" for interconnection permit Level 3 to select a single interconnection point per LATA and require BellSouth to deliver traffic originating on its network to that interconnection point at no charge to Level 3.[5] BellSouth has nominally agreed to a single interconnection point per LATA. However, BellSouth attempts to penalize Level 3 for exercising its right to establish a single

[5] *Id.*

interconnection point per LATA by shifting BellSouth's originating transport costs to Level 3. Because BellSouth's transport penalty is prohibited by law, the Commission should adopt Level 3's position.

FCC Rule 51.703(b) incorporates the second "rule of the road"—the principle that the originating carrier is financially responsible for delivering its traffic to the interconnection point:

> A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.[6]

As is well settled law, a LEC's costs of delivering its originating traffic to the network of a co-carrier are recovered in the LEC's end users' rates.[7] Thus, BellSouth is responsible for routing the call from its customer to the interconnection point and must absorb all costs associated with the origination of traffic on BellSouth's side of the network. Requiring the originating LEC to bear the costs of delivering its originating traffic to the interconnection point selected by the CLEC, and to compensate the terminating LEC for the transport and termination functions it performs, is consistent with the current calling-party's-network-pays ("CPNP") regime.[8] In short, BellSouth must "look to" its local end user customers to recover the costs of calls they make.[9] Similarly, Level 3 must bear the cost of delivering to the interconnection point any traffic originated by its local customers.

Not only does BellSouth seek to shift its originating transport costs to Level 3, it also seeks to impose above-cost, access tariffed ordering charges on Level 3 for the facilities BellSouth deploys in its network. Because Section 252(d)(1) requires cost-based rates for

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6 47 C.F.R. § 51.703(b).

7 *TSR Wireless,* at ¶ 34.

8 *Intercarrier Compensation NPRM,* at ¶ 9.

9 *Qwest Corp. et al. v. FCC et al,* 252 F.3d 462, 468 (D.C. Cir. 2001).

interconnection, BellSouth may not impose these tariffed charges on Level 3. The Commission should therefore adopt Level 3's language and require BellSouth to include in the Agreement ordering charges that comply with the Act's pricing requirements.

Because Level 3's position complies with federal law and BellSouth's does not, the Commission should adopt Level 3's contract language.

ISSUE TWO: Enhanced Applications Traffic - VoIP Traffic

Statement of the Issue: May BellSouth define switched access traffic to include all the Enhanced Applications Traffic ("EAT"), including VoIP traffic of the customers of Level 3 regardless of how such traffic is classified under federal law?

Applicable Contract Sections: Attachment 3, Section 7.4.1.

Level 3's Position

No. BellSouth's position ignores the distinction between the treatment of information services traffic ("Enhanced Applications Traffic" or "EAT") and telecommunication services traffic under federal law. Under current federal law, Enhanced Applications Traffic, such as VoIP, does not have imposed upon it access charges and thus enhanced service providers ("ESPs") do not pay access charges. ESPs are entitled to purchase from carriers such as Level 3 local access to the PSTN to originate and terminate EAT interstate information services.10 Therefore, for purposes of intercarrier compensation, those ESP customers of Level 3 are treated like any other business customer of local services. If Enhanced Applications Traffic, such as

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[10] *MTS and WATS Market Structure*, 97 FCC 2d 682, ¶¶ 77-8, 83 (1983), *aff'd in principal part and remanded in part, National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984); *WATS Related and Other Amendments of Part 69 of the Commission's Rules*, 64 RR 2d 503, 3 FCC Rcd 496, ¶ 10 (1988); *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, ¶ 342 (1997) (affirming that "ISPs may pay business line rates and the appropriate subscriber line charge, rather than interstate access rates, *even for calls that appear to traverse state boundaries.*") (emphasis supplied), *aff'd, Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998); *Intercarrier Compensation NPRM* at ¶ 6 ("long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption"); 47 CFR § 69.5(b) (requiring payment of interstate access charges by "*interexchange carriers* that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.") (emphasis supplied).

VoIP, is originated by or terminated to an ESP provider, both Level 3 and BellSouth are entitled to cost-based reciprocal compensation for terminating such VoIP Traffic.

BellSouth's Position

Yes. Regardless of whether the classification of Enhanced Applications Traffic, such as whether VoIP Traffic, is an information or telecommunications service, if it originates in one LATA and terminates in another LATA, it should be subject to above-cost access charges.

Basis for Level 3's Position

For more than twenty years, the FCC has made a regulatory distinction between basic (or telecommunications) and enhanced (or information) services. Congress codified this distinction in the 1996 Act and determined that encouraging the development of Internet services unfettered from regulation is national policy. The FCC's ESP exemption furthers that national policy and is responsible for enabling the Internet to grow from a limited, scientific and governmental communications network to the ubiquitous, open, interoperable network that all Americans enjoy today.

In 1998, in its *Report to Congress*,[11] the FCC reviewed a new application that is commonly referred to as Internet telephony, Internet Protocol ("IP") telephony, or voice over IP ("VoIP"). In the *Report to Congress*, the FCC declined to find that any form of VoIP was a telecommunications service subject to common carrier regulation. Although the FCC tentatively established a four-prong definition of a phone-to-phone VoIP application that bears characteristics of a telecommunications service, it refused to classify even this hypothetical application as such. Since the *Report to Congress*, the FCC has consistently and steadfastly

[11] *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501 (1998) ("*Report to Congress*").

refused to impose legacy, above-cost access charges on VoIP applications.[12] This Enhanced Applications traffic such as VoIP is subject to cost based, 251(b)(5) compensation.

BellSouth ignores federal law and seeks to impose access charges upon carriers such as Level 3 who provide interconnection services for ESP applications such as VoIP. BellSouth defines switched access traffic to include all forms of VoIP applications. Because ILECs such as BellSouth are ignoring federal law and attempting to impose access charges in violation of the FCC's ESP exemption, Level 3 has filed a forbearance petition with the FCC requesting that it remove any possible doubt concerning application of its exemption to ESP Enhanced Applications traffic such as VoIP Traffic. The FCC must act on Level 3's forbearance petition no later than March 23, 2005. Once the FCC acts on Level 3's petition, the Parties will incorporate the results through the change in law process. Pending the FCC decision, however, the Commission should adopt Level 3's position.

Beyond the regulatory framework that supports adopting Level 3's contract language, sound public policy – the encouragement of economic growth, support for the expansion of broadband facilities and deployment of advanced services throughout the state, and the benefits of true competition — demand that BellSouth's proposed language be rejected. The demands of the rapidly evolving technology and network underlying the Internet requires that the language proposed by Level 3 be adopted to provide operating and market certainty and promote competition in the provision of local services to ESP VoIP application providers.

ISSUE THREE: **Compensation For Locally-dialed ISP-Bound Traffic**

Statement of the Issue: Does the FCC's *ISP Remand Order* establish compensation for all locally dialed ISP-Bound Traffic?

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[12] *Report to Congress*, at ¶¶ 88-89.

Applicable Contract Sections: Attachment 3, Sections 7.1.2.

Level 3's Position

Yes. The FCC's *ISP Remand Order* governs the intercarrier compensation regime for all locally dialed ISP-Bound traffic.

BellSouth's Position

No. Pursuant to the *ISP Remand Order*, intercarrier compensation is due for ISP-Bound Traffic only if that traffic involves a call originated by a calling party in one LATA to an ISP server or modem in the same LATA.

Basis for Level 3's Position

In its April 2001 *ISP Remand Order* the FCC asserted exclusive jurisdiction over compensation issues related to ISP-bound traffic.[13] In the *ISP Remand Order*, the FCC ruled that traffic to ISPs was excluded from the reciprocal compensation requirements of Section 251(b)(5) by operation of Section 251(g) of the Act.[14] Further, under its authority to preempt the authority of states over intrastate communications recognized in *Louisiana PSC v. FCC,*[15] the FCC held that state commissions no longer had jurisdiction to address the issue of intercarrier compensation for ISP-bound traffic.[16] Thus, going forward, the FCC has sole authority to address all questions relating to intercarrier compensation for the exchange of ISP-

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[13] Although the U. S. Court of Appeals for the D.C. Circuit remanded the *ISP Remand Order* to the FCC for further consideration, the Court did not vacate the Order, leaving the federal compensation regime in place while the FCC deliberates the issue once again. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). Accordingly, even though the legal rationale supporting the basis for the FCC to promulgate its federal compensation regime has been rejected, the federal compensation regime itself remains intact and applies in this case.

[14] *ISP Remand Order,* at ¶ 46. This aspect of the *ISP Remand Order* was rejected by the D.C. Circuit. *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

[15] *Louisiana PSC v. FCC*, 476 U.S. 355, 106 S. Ct. 1890 (1986).

[16] *ISP Remand Order,* at ¶ 82.

bound traffic. This ruling necessarily includes intercarrier compensation in the form of bill and keep in connection with the exchange of ISP-bound traffic.

For the purposes of this Agreement, the Parties have agreed that all calls within a LATA will be treated as "local" and access charges will not apply. On the one hand, BellSouth acknowledges that if the modem bank is within a particular LATA and the call terminates in that LATA, the call is interstate and the FCC has preempted the Commission's jurisdiction to set compensation. Yet BellSouth also contends that if the modem bank is physically located outside of the LATA to which the ISP's telephone number is assigned, the call is intrastate and the Commission has jurisdiction to impose bill and keep. BellSouth is wrong on both assertions. The FCC did *not* distinguish "local" ISP-bound traffic from "non-local" ISP-bound traffic. In fact, the FCC repudiated its earlier distinction between "local" and "non-local" for all traffic:

> This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection [251](b)(5) as all "local" traffic. We also refrain from generally describing traffic as "local" traffic because the term "local," not being a statutorily defined category, is particularly susceptible to varying meanings, and significantly, is not a term used in section 251(b)(5) or section 251(g).[17]

Instead, the *ISP Remand Order* makes clear that the new federal regime applies to *all* ISP-bound traffic: "We conclude that this definition of 'information access' was meant to include *all access traffic* that was routed by a LEC 'to or from' providers of information services, of which ISPs are a subset."[18] Nowhere does the *Order* limit its regime to "local" ISP-bound traffic.

The FCC was fully aware that CLECs were using foreign exchange-like ("FX-like") arrangements to serve ISPs long before the *ISP Remand Order* was released. Several carriers—

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[17] *ISP Remand Order,* at ¶ 34.

[18] *ISP Remand Order,* at ¶ 44 (emphasis added).

both ILECs and CLECs, including Level 3—asked the FCC to include FX-like traffic within the scope of the order.[19] Several state commissions have recognized that the *ISP Remand Order* addressed all ISP-bound traffic, including traffic to ISPs that do not have a modem bank in the LATA and use FX-like arrangements.[20] An Arbitration Panel of the Texas Public Utility Commission has also considered the issue, and specifically addressed a position similar to the one taken by BellSouth in this proceeding. The Texas Arbitrators rejected the argument that "the ISP Remand Order does not apply to all types of ISP-bound traffic, but only to ISP traffic

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[19] *See* ex parte filings in FCC CC Docket No. 99-68: Letter dated March 28, 2001 from Gary L. Phillips, SBC Telecommunications, Inc., to Dorothy Attwood, Chief, Common Carrier Bureau, Federal Communications Commission, at 3; Letter dated March 7, 2001 from Susanne Guyer, Verizon, to Dorothy Attwood, at 2-3; Letter dated December 13, 2000 from John T. Nakahata, Counsel to Level 3 Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, at 1.

[20] *See Essex Telecom, Inc. v. Gallatin River Communications, L.L.C.*, Docket No. 01-0427, Order, at 8 (Ill. C.C. July 24, 2002) ("with the adoption of the ISP Remand Order, the Commission has been divested of jurisdiction to determine compensation issues as they relate to ISP bound calls."); *accord, Global NAPs, Inc. (U-6449-C) Petition for Arbitration of an Interconnection Agreement with Pacific Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, A.01-11-045, A.01-12-026, Opinion Adopting Final Arbitrator's Report With Modification (Cal. PUC July 5, 2002); *Investigation as to Whether Certain Calls are Local*, DT 00-223, *Independent Telephone Companies and Competitive Local Exchange Carriers – Local Calling Areas*, DT 00-054, Final Order, Order No. 24,080 (NH PUC Oct. 28, 2002); *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 U.S.C. Section 252 of Interconnection Rates, Terms, and Conditions*, Docket No. 05-MA-130, Order Approving an Interconnection Agreement, at 8-9 (Wisc. P.S.C. Feb. 13, 2003); *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc.*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision, at 2-4 (Wash. U.T.C. Feb. 27, 2003); *Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order (Ore. PUC May 27, 2003), *rehearing denied*, Order (Ore. PUC Sep. 16, 2003); *Allegiance Telecom of Ohio, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award, at 9 (PUC Ohio Oct. 4, 2001) ("The Commission agrees . . . that all calls to FX/virtual NXX [numbers] that are also ISP-bound are subject to the inter-carrier compensation regime set forth in the ISP Remand Order."); *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio dba Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUC Ohio May 9, 2002); *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities*, Dkt. No. 01-01-29, at 41-2 (Conn. DPUC Jan. 30, 2002) ("intercarrier compensation for ISP-bound traffic is within the jurisdiction of the FCC and that on a going forward basis, the Department has been preempted from addressing the issue beyond the effective date of the ISP Order [June 14, 2001]."); *TDS Metrocom, Inc.*, Case No. U-12952, Opinion and Order (Mich. PSC Sept. 7, 2001) (with respect to FX-like traffic, the ISP Remand Order "takes care of ISP traffic.").

that originates and terminates in the same local calling area."[21] Because the FCC had said ISP-bound traffic was subject to Section 251(g) rather than Section 251(b)(5), all compensation for it was governed by the FCC's rules adopted under its Section 201 authority.[22] The Florida Commission also issued a decision regarding this issue stating that "due to the FCC's recent *ISP Remand Order*, which removes ISP-bound traffic from state jurisdiction, this issue is limited to intercarrier compensation arrangements for traffic that is delivered to non-ISP customers."[23]

Because the FCC has exclusive jurisdiction over locally-dialed calls to ISPs, regardless of whether the ISP has equipment in the LATA and is served through an FX-like arrangement, the Commission should adopt Level 3's position and apply the FCC's interim compensation regime to all locally-dialed ISP-bound traffic.

ISSUE FOUR: **Compensation For ISP-Bound Traffic From January 1, 2004 Until The Effective Date Of A Subsequent Agreement**

Statement of the Issue: Does the Amendment to the Parties' existing interconnection agreement executed on December 24, 2003, provide that the intercarrier compensation rate for ISP-bound traffic is $0.001 per minute of use ("MOU") from January 1, 2004 until the effective date of a subsequent agreement?

Applicable Contract Sections: Existing Agreement, Attachment 3, Sections 5.1.2, 5.1.3; Amendment, dated Dec. 24, 2003, Sections 2.2, 3; New Attachment 3, Sections 7.1.4.

Level 3's Position

Yes. Pursuant to the Amendment to the Parties' existing interconnection agreement, executed on December 24, 2003 ("Amendment") the intercarrier compensation rate for ISP-

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[21] *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, PUC Docket No. 241015, Revised Arbitration Award, 31 (Tex. PUC Aug. 28, 2002).

[22] *Id.*

[23] *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996*, Docket No. 000075-TP, Order on Reciprocal Compensation, Phases II and IIA, Order No. PSC-02-1248-FOF-TP, 26 (Fla. PSC Spet. 10, 2002).

bound traffic is $0.001 per MOU commencing on January 1, 2004 until the effective date of a subsequent agreement entered into by the Parties.[24]

BellSouth's Position

No. BellSouth believes that the rate should be $0.0007.

Basis for Level 3's Position

Section 2.2 of the Amendment provides that "[i]f as of the expiration of this Agreement a Subsequent Agreement has not been executed by the Parties, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated or arbitrated." In addition Section 3 of the Amendment provides that except for provisions that were expressly modified in the Amendment, such as the collocation provisions, "[a]ll other provisions of the Agreement, dated January 1, 2001, shall remain in full force and effect." In short, the Parties agreed in the Amendment that the terms of the Parties' existing agreement that were not modified by the Amendment, including the terms regarding intercarrier compensation, would remain in effect until the effective date of a subsequent agreement.

Under Section 5.1.3 of the existing interconnection agreement, the Parties agreed to compensate each other for termination of ISP-bound traffic "at the same per minute of use rates set forth in Section 5.1.2" for Local Traffic. Pursuant to Section 5.1.2, the rate that was in effect on December 24, 2003 (the date of the Amendment) was $0.001 per MOU. Thus, the intercarrier compensation rate for ISP-bound traffic and Local Traffic from January 1, 2004 until the effective date of a subsequent agreement (the "Evergreen Period") is $0.001 per MOU as established in Sections 5.1.2 and 5.1.3 of the Agreement. BellSouth now seeks to renege on the Parties' bargain as memorialized in the Amendment and use a rate of $0.0007 for the exchange

[24] The Amendment and relevant provisions of the Existing Agreement are attached hereto as Exhibit C.

of ISP-bound traffic during this Evergreen Period. The Commission should not permit BellSouth to avoid the terms of the Amendment and should adopt Level 3's proposed contract language.

ISSUE FIVE: Amount of Minutes Of ISP-Bound Traffic Subject to Intercarrier Compensation For 2004 and Subsequent Years

Statement of the Issue: Does the FCC's *ISP Remand Order* impose a growth cap on the total MOU of ISP-bound traffic for which intercarrier compensation is due for the year 2004 and subsequent years?

Applicable Contract Sections: Attachment 3, Sections 7.1.4, 7.1.5.

Level 3's Position

No. Although, the FCC's *ISP Remand Order* establishes a growth cap on the total MOU of ISP-bound traffic for which intercarrier compensation is due for 2001, 2002, and 2003, the *ISP Remand Order* on its face does not set a growth cap for 2004. Accordingly, there is no cap on the ISP-bound traffic MOU that are subject to intercarrier compensation under the FCC's regime in 2004 and subsequent years. Intercarrier compensation is due for all ISP-bound traffic MOU terminated by a Party in year 2004 and subsequent years.

BellSouth's Position

Yes. The amount of traffic in BellSouth's view, for which compensation is due is limited up to a ceiling equal to a ten percent growth factor added to, on an annualized basis, the number of ISP-bound traffic MOU for which the terminating Party was entitled to compensation during the first quarter of 2001, plus an additional ten percent.

Basis for Level 3's Position

In the *ISP Remand Order*, the FCC asserted exclusive jurisdiction over compensation issues related to ISP-bound traffic on a going forward basis. In that Order, the FCC ruled that traffic to ISPs was excluded from the reciprocal compensation requirements of Section 251(b)(5)

by operation of Section 251(g) of the Act.[25] As discussed more fully above, the FCC then adopted an intercarrier compensation regime for ISP-bound traffic that relies in part on state-set rates for ISP-bound traffic and established a rebuttable presumption that traffic above a ratio of 3:1 terminating to originating traffic is ISP-bound traffic. Under the FCC's interim intercarrier compensation regime, traffic above the 3:1 ratio will be capped at $0.0015/MOU for 6 months from the effective date of the Order; at $0.0010 /MOU for the next 18 months; and at $0.0007/MOU for 36 months from the effective date of the Order "or until further Commission action (whichever is later)."[26]

The FCC's interim intercarrier compensation regime also established a growth cap applicable to ISP-bound traffic for the years 2001, 2002, and 2003, but not for 2004 and beyond. Specifically, the FCC stated:

> In addition to the rate caps, we will impose a cap on total ISP-bound minutes for which a LEC may receive this compensation. For the year 2001, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to, on an annualized basis, the number of ISP-bound minutes for which that LEC was entitled to compensation under that agreement during the first quarter of 2001, plus a ten percent growth factor. For 2002, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the minutes for which it was entitled to compensation under that agreement in 2001, plus another ten percent growth factor. In 2003, a LEC may receive compensation, pursuant to a particular interconnection agreement, for ISP-bound minutes up to a ceiling equal to the 2002 ceiling applicable to that agreement.[27]

Significantly, the FCC did not establish a growth cap on ISP-bound traffic for 2004 and subsequent years in this passage or anywhere else in the *ISP Remand Order* or any other FCC

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[25] *ISP Remand Order*, at ¶ 46. This holding of the *ISP Remand Order* was rejected by the D.C. Circuit Court of Appeals.

[26] *ISP Remand Order*, at ¶ 78.

[27] *Id.*

Order. Thus, on its face, the *ISP Remand Order* does not establish a growth cap on compensation for ISP-bound traffic and compensation is due for all such MOU starting in 2004.

The FCC's intention in the *ISP Remand Order* not to impose a growth cap on ISP-bound traffic for 2004 and beyond is particularly self-evident when the language establishing the growth caps for earlier years is contrasted with the language in the same paragraph establishing the rate caps for all years. As noted above, the FCC unequivocally stated in the *ISP Remand Order* that the $0.0007 rate cap for ISP-Bound Traffic starts "in the twenty-fifth month, and continue[s] through the thirty-sixth month or until further [FCC] action (whichever is later)."[28] Obviously, the FCC knows how to impose a cap for subsequent years when it desires to do so (as it clearly did for the rate cap in the same paragraph). The FCC did not, however, state that the growth cap would remain in place until further FCC action. Thus, under the plain meaning of the *ISP Remand Order*, the FCC did not impose a growth cap on ISP-bound traffic for the year 2004 and beyond.

BellSouth's proposed language is inconsistent with the plain meaning of the *ISP Remand Order* because it purports to impose a growth cap for the year 2004 until the expiration of the agreement. Level 3's proposed language is consistent with the *ISP Remand Order* because it does not impose any such growth cap. The Commission should therefore reject BellSouth's position and adopt Level 3's position.

ISSUE SIX: **Recurring Charges For SS7 Signal Messaging**

Statement of the Issue: Where a Party provides elements of its own SS7 network (or leases elements from a third party provider), should the other Party be precluded from imposing recurring charges for SS7 signal messages for intraLATA traffic exchanged under the agreement?

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[28] *ISP Remand Order*, at ¶ 78.

Applicable Contract Sections: Attachment 3, Section 5.2.

Level 3's Position

Yes. SS7 Integrated Services Digital Network User Part ("ISUP") messages are an integral part of call set-up and switching functionality. BellSouth's separate SS7 message charge should be rejected as anti-competitive because it shifts some of BellSouth's costs to its competitors, imposes unnecessary costs on its competitors, and violates rules mandating that the originating Party bears financial responsibility for delivering its traffic to the interconnection point.

BellSouth's Position

No. BellSouth has not responded to Level 3's proposed language. Accordingly, BellSouth's position is unknown.

Basis for Level 3's Position

SS7 ISUP messages are an integral part of call set-up and switching functionality. The Service Switching Point ("SSP") is typically the part of the LEC's local switch that generates the signaling messages that are used to set-up or tear down a call and are transported through the remaining components of the SS7 network.[29] Each SSP has a unique address in the SS7 network that is identified through a point code assignment. The SS7 network, in turn, ensures that the SS7 messages are properly routed to the SSP that is associated with a given point code. SSPs are connected to Signal Transfer Points ("STPs") through redundant facilities. STPs act like traffic

[29] *Cox Nebraska Telecom, LLC and Iluminet, v. Qwest Communications, Inc.*, Formal Complaint No. FC-1296, ¶¶ 24-27 (Neb. PSC Dec. 17, 2002) ("*Cox Decision*") ("there would be no voice traffic if the SS7 messages at issue were not exchanged between the SSPs").

cops, routing the SS7 messages to the SSP operated by the carrier that provides service to the called party.[30]

Under standard industry practice, SS7 ISUP message costs have been recovered through the intercarrier compensation rate applicable to traffic of a particular jurisdiction. For example, reciprocal compensation rates typically include a switching component that is intended to recover SS7 ISUP messaging cost and other costs for Section 251(b)(5) traffic.[31] Likewise, intrastate access charges typically have compensated LECs for the SS7 message costs and other costs associated with intraLATA toll traffic.[32] Level 3's proposed language provides for intercarrier compensation for all forms of traffic exchanged between the Parties such that separate compensation for SS7 messages is unnecessary. BellSouth has not justified a departure from this standard industry practice.

In addition, as determined by the Florida Commission staff, establishing a separate intercarrier compensation system for SS7 messages "would unnecessarily and unreasonably increase costs for competitive carriers that provision their own SS7 networks by requiring that they invest in a system simply to reciprocal[ly] bill BellSouth."[33] BellSouth's unilateral imposition of these costs upon competitors would have the effect of undermining competition.

Further, under the recovery schemes that BellSouth has attempted to impose in the past in many states, BellSouth has billed "for ISUP and TCAP messages regardless of the originating

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[30] *Cox Decision*, at ¶¶ 26-29.

[31] *Cox Decision*, at ¶ 63 ("SS7 message charges are included within the reciprocal compensation rates or bill-and-keep arrangements included in the [interconnection agreements]").

[32] IntraLATA toll access charges not only operate to recover the LEC's incremental costs relating to such traffic, but also typically contain an implicit subsidy to fund universal service programs.

[33] *Joint Petition of US LEC of Florida, Inc., Time Warner Telecom of Florida, L.P., and ITC DeltaCom Communications Objecting to and Requesting Suspension of Proposed CCS7 Access Arrangement Tariff Filed By BellSouth Telecommunications, Inc.*, Docket No. 020129-TP, Vote Sheet and Staff Recommendations, at Issue 8 (Feb. 18, 2003).

party or the direction of the message."[34] Thus, BellSouth seeks to impose SS7 message costs upon competitors where BellSouth's customer originated the underlying call and is the cost causer of the SS7 messages. BellSouth should not be permitted to shift its costs to other carriers.[35] In this case, BellSouth's scheme violates existing law which requires that the originating party bears financial responsibility for delivering its traffic to the interconnection point.[36] Accordingly, the Commission should adopt Level 3's position to preclude such anti-competitive conduct by BellSouth.

B. TIER II COMPLIANCE ISSUES IMPACTING THE COMMERCIAL UTILITY OF THE AGREEMENT.

Resolution of these Tier II issues is important to make the agreement comply with current law and ensure that it is commercially reasonable and useful to the Parties. If the Commission does not resolve these issues, the result will be an unacceptable degree of uncertainty and commercial impracticality that will be discriminatory against Level 3, thereby increasing risk and deterring competition.

ISSUE SEVEN: Should BellSouth establish standard processes and rates for any routine network modifications that it has performed?

Applicable Contract Provisions: Attachment 2, Section 1.8.2, 2.8.6.2, 5.2.4, 6.2.5, 6.4.2.

Level 3's Position

Yes. Once BellSouth has performed a routine network modification for a requesting carrier for the first time, be it Level 3 or any other party to a BellSouth interconnection

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[34] *Id.* at Issue 7.

[35] *See, Cox Decision*, at ¶ 46 ("the effect of Qwest's intrastate SS7 message rate structure is to deter competition by an improper increase of the costs to a competitor or at least a shift of Qwest's costs to other carrier, thus providing Qwest an improper competitive advantage . . . we will not allow that result to occur").

[36] 47 C.F.R. § 51.703 ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."); *Intercarrier Compensation NPRM*, at ¶ 9.

agreement, then BellSouth should document the process used to implement those modifications and the cost of the modification so that they may be referenced and invoked by subsequent requesting carriers.

BellSouth's Position

No. BellSouth believes that each routine network modification that it has not "anticipated" should be provided on an individual case basis or pursuant to BellSouth's Special Construction Process, regardless of whether this modification has been performed previously.

Basis for Level 3's Position

Level 3's proposal to resolve this issue is consistent with federal law and the FCC's rules. Section 251(c)(3) of the Act provides that incumbent LECs:

> have a duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.[37]

More specifically, FCC Rule 51.319(a)(8) provides, in part, that "[a]n incumbent LEC shall perform these routine network modifications to unbundled loop facilities in a nondiscriminatory fashion."

Level 3 maintains that the best way to ensure nondiscrimination among BellSouth and requesting parties, with the least enforcement burden for all concerned, is for BellSouth to establish and publish standard procedures and rates for each routine network modification as it is developed and implemented. The benefits of this requirement are demonstrated by analogy to the Section 252(h) and (i) requirements that interconnection agreements be filed and their terms

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[37] 47 U.S.C. § 252(c)(3).

be made available to other requesting carriers -- requirements that the FCC views "as the primary tool of the 1996 Act for preventing discrimination under section 251 . . . ."[38]

Level 3 is not requesting that BellSouth disclose information that may be confidential to specific requesting parties. Rather, Level 3 requests that BellSouth make available to Level 3 the same process and rates BellSouth used for any prior requesting carrier or itself. In order to ensure that BellSouth does not discriminate among carriers in providing routine network modifications, it should make available details concerning the process governing each type of modification and the cost of each modification which should conform to Section 252(d) of the Act. BellSouth's refusal to do so not only invites discriminatory conduct, it also introduces needless delays (through the individual case basis process or Special Construction Process)

The FCC has already determined as a matter of law that, at a minimum, the following network modifications are routinely performed by the ILECs and must be performed by the BellSouth on behalf of requesting CLECs:

> rearranging or splicing of cable; adding an equipment case; adding a doubler or repeater; adding a smart jack; installing a repeater shelf; adding a line card; deploying a new multiplexer or reconfiguring an existing multiplexer; and attaching electronic and other equipment that the [ILEC] ordinarily attaches to a DS1 loop to activate such loop for its own customer.[39]

Thus, the FCC has already determined that BellSouth has an obligation to provide the routine network elements expressly listed in Rule 51.319(a) and additional modifications as determined by the FCC or Commission to requesting CLECs. Level 3 merely requests that it have the ability to receive a routine network modification that, by definition, is "routine," in a timely manner,

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[38] *Local Competition Order*, at ¶ 1296.

[39] 47 C.F.R. § 51.319(a)(8). The FCC has also determined that "activities needed to enable a requesting telecommunications carrier to light a dark fiber transport facility" are "routine" network modifications that must be provisioned by BellSouth on behalf of Level 3. 47 C.F.R. § 51.319(e)(5).

pursuant to a standard non-discriminatory process and established prices that conform to Section 252(d) of the Act. To the extent they are not already in place, BellSouth should be required to develop such standard processes and Section 252(d) compliant charges once BellSouth has provisioned such modification for any CLEC for the first time. Level 3's position is consistent with the Act and FCC rules and is commercially reasonable. The Commission should therefore adopt Level 3's proposed contract language.

ISSUE EIGHT: Dispute Resolution For Non-Billing Disputes

Statement of the Issue: Should the Parties escalate non-billing disputes to their higher level representatives for a minimum of thirty (30) days of negotiation in order to resolve a non-billing dispute prior to petitioning a court or agency of competent jurisdiction for resolution?

Applicable Contract Sections: General Terms, Sections 10.1, 10.3.

Level 3's Position

Yes. The Parties have settled disputes in the past without Commission intervention through negotiation by each Party's senior managers under dispute resolution procedures nearly identical to those proposed by Level 3. Thus, adoption of Level 3's proposed process is likely to save the Commission staff and the Parties significant resources in resolving issues without litigation. Moreover, Level 3 should not be forced to forego its rights to seek relief in any forum as a condition of obtaining an interconnection agreement with BellSouth.

BellSouth's Position

No. BellSouth has not explained why it will not agree to use dispute resolution procedures that have worked and it has agreed to use in the past or why it limits the forum for dispute resolution to the Commission.

Basis for Level 3's Position

Level 3 proposes that the Parties attempt to resolve non-billing disputes in the first instance by requiring that each Party appoint a designated representative who has authority to

settle the dispute and who is at a higher level of management than the persons administering the Agreement. These representatives are then required to negotiate for a minimum of thirty (30) days after appointment in an attempt to resolve the dispute without Commission involvement. BellSouth agreed to nearly identical terms in Sections 12.3.1 and 12.3.2 of the Parties' existing agreement and has insisted on using such a process in the past. In fact, the Parties have frequently and successfully used such higher level negotiations to settle significant interconnection and intercarrier compensation disputes without Commission involvement. BellSouth has not explained why it now seeks to discard this proven and successful dispute resolution process in favor of taking non-billing disputes directly to the Commission.

Level 3's proposal is not only consistent with the longstanding and proven dispute resolution practices of the Parties, but also is likely to save the Commission and its staff considerable resources in addressing such disputes by obviating the need for Commission involvement. At a minimum, Level 3's proposed process will ensure that the disputed issues are well formulated before one of the Parties petitions the Commission to resolve the issue. In short, Level 3's proposed process should be adopted in an effort to conserve the resources of the Parties by settling issues without litigation where feasible.

BellSouth's proposed section 10.1 also requires the Parties to agree to bring all non-billing disputes solely to the Commission for resolution as a condition of obtaining an interconnection agreement. Level 3's proposed language preserves each Party's rights to seek relief from any court or other agency of competent jurisdiction.

Level 3's language is more reasonable because some non-billing disputes may be outside the expertise or even the jurisdiction of the Commission and a broader array of remedies may be available in other forums. For example, the FCC has exclusive jurisdiction over issues regarding

interstate services and extensive expertise regarding interstate issues. Further, in some instances it may be more efficient for a Party to seek relief from the FCC rather than petition the nine separate state commissions that govern BellSouth's operating region. By bringing a dispute before the FCC under Section 208 of the Act or some other authority, a Party can in some instances avoid the expense of litigating in nine jurisdictions and minimize the potential for inconsistent decisions among the state commissions. Further, BellSouth agreed to a similar provision in Section 12.3.2 of the Parties' existing agreement and has not justified a deviation from the Parties' long-standing practice. Finally, it is unreasonable for BellSouth to force Level 3 to forego its rights to obtain relief in forums other than the Commission as a condition of obtaining an interconnection agreement. Thus, the Commission should reject BellSouth's position and direct the Parties to incorporate Level 3's proposed language in their Agreement.

ISSUE NINE: Liability of Level 3 Entities

Statement of the Issue: Should affiliates of Level 3 that are not a Party to the Agreement, are not CLECs, and do not obtain services under the Agreement be "jointly and severally liable" for obligations of Level 3 under the Agreement?

Applicable Contract Sections: General Terms, Section 7.1.

Level 3's Position

No. Only Level 3 affiliates that have rights and obligations under the Agreement and are certificated CLECs should be liable for obligations under the Agreement.

BellSouth's Position

Yes. If "Level 3 consists of two (2) or more separate entities," then "all such entities shall be jointly and severally liable for the obligations of Level 3 under this Agreement."

Basis for Level 3's Position

Only those Level 3 entities that have rights and obligations under the Agreement and are certificated CLECs should be jointly and severally liable for obligations arising under the

Agreement. Level 3 Communications, LLC is the only Level 3 entity that is certificated as a CLEC under state law in the BellSouth operating region and is eligible to obtain services pursuant to Section 251(c) of the Act. Level 3 Communications, LLC operating as a CLEC is the only Level 3 entity that will obtain services under the Agreement including, but not limited to, interconnection, collocation, access to UNEs, and transport and termination of traffic originated on its network. In turn, Level 3 Communications, LLC operating as a CLEC will provide services to BellSouth under the Agreement including, for example, transport and termination of traffic originated by BellSouth customers. Level 3's proposed language is reasonable because only Level 3 Communications, LLC, is a Party to the Agreement. Level 3's proposed contract language ensures that this entity will be bound by its terms and liable for obligations arising under the Agreement.

BellSouth, however, has taken the unreasonable position that under its proposed language, all Level 3 affiliates —entities that do not obtain or provide services under the Parties' Agreement and are not CLECs or telecommunications carriers — should be liable under the Agreement. BellSouth's position is unreasonable as demonstrated by the fact that under Sections 251(c) and 252 of the Act only LECs may obtain collocation, direct interconnection, access to UNEs, resale at a wholesale discount rate and other services under a Section 251(c) interconnection agreement. In fact, BellSouth has refused to execute 251(c) interconnection agreements with entities that are not certificated LECs pursuant to state law. If BellSouth may refuse to grant such entities rights under the Agreement, it may not demand obligations from such entities in the form of joint and several liability under the Agreement. For example, Level 3

owns a software services company, Software Spectrum, Inc.,[40] that does not obtain or provide services under the Agreement and is neither a LEC nor a telecommunications carrier. BellSouth's proposed language disregards the corporate form and purports to make this entity liable under the Agreement even though it has no relationship to the Agreement. BellSouth's position is unreasonable and should be rejected as inconsistent with the Act and applicable law.

ISSUE TEN: **Severability**

Statement of the Issue: Should the Agreement provide that it is "indivisible and nonseverable" such that all of the provisions of the contract must be valid or the entire contract is invalid?

Applicable Contract Sections: General Terms, Section 16.

Level 3's Position

No. The provisions of the Agreement should be servable. If a provision is found to be invalid, then the remaining provisions should not be affected by the holding of invalidity.

BellSouth's Position

Yes. All provisions of the Agreement are "indivisible and nonseverable" and must be taken as a "single whole."

Basis for Level 3's Position

Especially in this rapidly changing regulatory environment, the provisions of the Agreement should be severable. If a provision is found to be invalid, then the remaining provisions should not be affected by the holding of invalidity, provided that the Parties attempt to reformulate the invalid provisions to give effect to such portions thereof as may be valid without defeating the intention of the provision. BellSouth, on the other hand, has proposed language that would make the provisions of the Agreement "indivisible" and "nonseverable." The result

[40] Software Spectrum, Inc. is a global business-to-business software services provider that markets and provides enterprise software management that help organizations increase business value from information technology.

of adopting BellSouth's language would be that if one provision of the Agreement is found invalid, the entire Agreement would be invalid and the Parties would have to renegotiate an entire new agreement.

In the continually evolving and changing legal environment surrounding the telecommunications industry it is inevitable that some provision of the Agreement will be rendered invalid during the term of the Agreement due to a change in law. For this reason, Parties to an interconnection agreement typically include a change-in-law provision to address such changes. Under BellSouth's proposed language, however, such a change in law would invalidate the entire Agreement and waste the enormous resources the Parties, and potentially the Commission as well, invested in establishing the Agreement in the first instance. Level 3's position is more reasonable in that it seeks to conserve resources by preserving the validity of the terms that are not implicated and the overall validity of the Agreement, while forcing the Parties to negotiate to address any invalidity or change in law under sections 14.3 and 16 of the Agreement.

In addition, BellSouth's proposed language is inconsistent with federal law because it seeks to undermine Section 252(i) of the Act and FCC Rules 51.809(a)-(c) by precluding other requesting carriers from exercising their "pick-and-choose" rights to adopt portions of the Agreement.[41] The FCC's "pick-and-choose" rule provides that ILECs must permit third party requesting carriers to obtain access "without unreasonable delay" to "any *individual* interconnection, service, or network element arrangement contained in any agreement to which [the ILEC] is a party that is approved by a state commission pursuant to section 252 of the

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[41] 47 U.S.C. §252(i); 47 C.F.R. § 809(a)-(c).

Act."[42] The "pick-and-choose" rules were upheld by the U.S. Supreme Court which noted that the FCC's interpretation of Section 252(i) as embodied in its rules was reasonable and in fact the "most readily apparent" reading of Section 252(i) because it closely tracks the statutory text.[43]

Notwithstanding these clear tenets of federal law, BellSouth proposes contract language that characterizes every provision of the Agreement as "indivisible," "nonseverable" and part of a "single whole" so that no third party carrier may adopt a portion of the Agreement as permitted under Section 252(i) and the FCC's rules. Accordingly, the Commission should reject BellSouth's language because it is commercially unreasonable and contrary to governing federal law and adopt Level 3's language.

ISSUE ELEVEN: Deposits

Statement of the Issue: Are the deposit policies proposed by BellSouth warranted and sufficiently narrow and unambiguous to prevent discriminatory or anticompetitive application?

Applicable Contract Sections: Attachment 7, Sections 1.8, 1.8.1, 1.8.2, 1.8.3, 1.8.4, 1.8.5.

Level 3's Position

No. The deposit policies proposed by BellSouth are unwarranted and overreaching, providing BellSouth with ample opportunity to engage in discriminatory and anticompetitive behavior to Level 3's detriment.

BellSouth's Position

Yes. The deposit policies proposed by BellSouth are necessary to ensure payment and avoid nonpayment.

Basis for Level 3's Position

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42 47 C.F.R. § 809(a)-(c) (emphasis added); *Local Competition Order,* at 16139, ¶ 1314.

43 *Iowa Utilities Board v. FCC,* 525 U.S. 366, 396 (1999).

BellSouth seeks unilateral discretion to increase, with no limit, Level 3's security deposit and to terminate service if Level 3 fails to meet BellSouth's demands. Such unilateral discretion has already been reviewed by the FCC and found unwarranted, unreasonable, and unjust. In its *Policy Statement*,[44] the FCC determined that deposit policies similar to those proposed herein by BellSouth are overly broad, "imposing undue burdens on access customers . . . ."[45] Acknowledging the impact of the telecommunications bankruptcies, the FCC nonetheless concluded that concerns over an increased risk of nonpayment did not outweigh the potential harm to carrier-customers. The FCC recommended that the incumbent LECs propose "narrower protections such as accelerated and advanced billing."[46]

BellSouth proposes to impose an increased security deposit on Level 3 regardless of Level 3's payment history or established credit. Under its proposal, BellSouth, based on its "sole opinion" and discretion, may demand additional security and/or "file a Uniform Commercial Code security interest in Level 3's accounts receivable and proceeds." Moreover, if BellSouth determines that Level 3 has failed to meet such additional security demands, BellSouth may terminate service to Level 3. BellSouth's proposal would also allow Bellsouth unilaterally to terminate service to Level 3 if a state commission, reviewing a deposit dispute between the Parties, failed to resolve such dispute within 60 days. It is absurd to require a trigger for

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[44] *Verizon Petition for Emergency Declaratory and Other Relief*, Policy Statement, WC Docket No. 02-202, FCC 02-337 (rel. December 23, 2002) ("*Policy Statement*"). Soon after Verizon filed its Petition, BellSouth filed tariff Transmittal No. 657, proposing new security deposit provisions. BellSouth Telecommunications, Inc., Tariff FCC No. 1, Transmittal No. 657 (July 19, 2002). The FCC suspended Transmittal No. 657 for five months and initiated an investigation to determine whether the new provisions were "unjust, unreasonable or unreasonably discriminatory in violation of sections 201 and 202 of the Act." BellSouth Telecommunications, Inc., Tariff FCC no. 1, Transmittal No. 657, Order, DA 02-2318 (2002). Subsequent to the release of the FCC's *Policy Statement*, BellSouth voluntarily withdrew its tariff.

[45] *Id.* at ¶ 6.

[46] *Id.* at ¶ 30.

termination that is wholly beyond Level 3's control. On their face, the terms of BellSouth's proposal are unreasonable and unjust.

Level 3's proposal would require the completion of a BellSouth Credit Profile and allow the Parties to negotiate a security deposit if BellSouth determines that a security deposit or increase in a security deposit is necessary, based on the results of its credit analysis. Level 3 further proposes that if the Parties cannot reach agreement on the security deposit, either Party may petition a state commission within 45 days. This proposal is a significant compromise considering the FCC's *Policy Statement* and previous FCC decisions on security deposits. In its *Access Tariff Order,* the FCC permitted the collection of a deposit *only* when a carrier had a proven history of late payment or no established credit.[47]

C. REMAINING ISSUES WITHIN THE AGREEMENT (TIER III)

The Tier III issues concern language within the agreement that requires modification so that the agreement is internally consistent, commercially reasonable, and in compliance with applicable laws. Level 3 does not believe that there is a significant degree of disagreement between the Parties as to these issues. Level 3 hopes and expects that the Parties will be able to resolve most of the Tier III issues through further negotiations prior to hearing. However, in order to preserve its rights, Level 3 provides a brief summary (with references to applicable contract sections) of each Party's position on the remaining issues. Level 3 presents these issues by Attachment.

GENERAL TERMS AND CONDITIONS

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[47] *Investigation of Access and Divestiture Related Tariffs,* CC Docket No. 83-1145, Phase I Order, 97 FCC 2d 1082, 1169 (1984); *Annual 1987 Access Tariff Filings*, Memorandum Opinion and Order, 2 FCC Rcd 280, 304, 318 (1986) ("*Access Tariff Order*").

ISSUE GT-1 (General Terms and Conditions, Definitions, page 1): The Parties have been unable to agree on specific definitions within the Agreement. Specifically, Level 3 proposes to include an overarching provision that all definitions are subject to changes in law. This would allow for further refinements and changes automatically, without a formal amendment each and every time a change in law results in a revised definition. Level 3 understands that Bellsouth wants to copy word-for-word the definitions currently in the Act, subject to a formal amendment process should those definitions be revised through a change in law.

ATTACHMENT 1 (Resale)

ISSUE 1-1 (Attachment 1, Section 3.5, page 5): The Parties have not been able to reach agreement on the use of Customer Proprietary Information. Level 3 has inserted language that states both Parties will comply with the Act and applicable rules. BellSouth disagrees with the insert.

ISSUE 1-2 (Attachment 1, Section 3.6, page 5): Level 3 has proposed to make clear that neither of the Parties has proprietary rights to telephone numbers. Moreover, because both Parties are LECs subject to Section 251(c)(2), any limitations or rights concerning numbers should be reciprocal. BellSouth disagrees with both of Level 3's proposals.

ISSUE 1-3 (Attachment 1, Section 3.6, page 5): The Parties have been unable to agree upon BellSouth's reservation of rights as it pertains to changing numbers when BellSouth deems it necessary.

ISSUE 1-4 (Attachment 1, Section 3.13, page 6): The Parties have been unable to agree upon language concerning the unauthorized use of resold services.

ISSUE 1-5 (Attachment 1, Section 5.7, page 10): The Parties have not been able to agree on language that would prevent BellSouth from marketing its services to Level 3 end users in the context of a maintenance call. Level 3 has inserted a proposal to restrict such marketing, which BellSouth has stricken.

ATTACHMENT 2 (Network Elements)

ISSUE 2-1 (Attachment 2, Section 1.8, page 4): The Parties have been unable to agree on BellSouth's right to terminate elements no longer required under the Agreement. Level 3 proposes that where elements or combinations of elements are available, that it has 30 days or such transition period as permitted by law or as the parties mutually agree to complete a rearrangement or disconnection of the service. BellSouth rejects this change and insists that it have the sole right to terminate services without notice if orders to rearrange or terminate services are not received within 31 days after the Effective Date of this Agreement.

ISSUE 2-2 (Attachment 2, Sections 1.8.1, 2.8.2.9, pages 4, 23): The Parties have been unable to agree on whether, in the event of a change in FCC unbundling requirements, Applicable Law controls. Level 3 proposes that Applicable Law controls in the event of a change in law. BellSouth has rejected Level 3's proposal. Level 3 responded with a proposal that the Parties resolve any differences with regard to a change in law via the dispute resolution provisions of the Agreement. BellSouth has yet to indicate whether it will accept or reject Level 3's subsequent offer.

ISSUE 2-3 (Attachment 2, Section 2.1.1.4, pages 7-8): The Parties have not been able to agree on BellSouth's obligations to provide access to fiber-to-the-home ("FTTH") overbuilds. Level 3 believes that BellSouth should provide access to Loop orders in an FTTH overbuild area according to BellSouth's standard Loop provisioning interval. BellSouth flatly rejects this

request and insists that each loop order will be handled on a project basis, which means that the Parties must negotiate the applicable provisioning intervals.

ISSUE 2-4 (Attachment 2, Section 2.1.4, page 8): The Parties have not been able to agree on language concerning BellSouth's obligations to provide access to loop test points. Level 3 proposes language that clearly states that BellSouth must provide access to physical loop test points on a nondiscriminatory basis for purposes of loop testing, maintenance and repair activities. BellSouth rejects this change.

ISSUE 2-5 (Attachment 2, Section 2.3.8, page 14-15): The Parties have not been able to agree on language concerning BellSouth's obligations to provide unbundled DS-3 transport. Level 3 proposes to clarify that DS-3 transport may be provisioned over fiber optic transport systems as well as through a metallic-based electrical interface. BellSouth rejects Level 3's change.

ISSUE 2-6 (Attachment 2, Section 2.5.1, page 18): The Parties have been unable to agree on whether Level 3 should be required to pay BellSouth's costs of conditioning lines at TELRIC rates according to FCC and Commission rules. Level 3 requests that BellSouth agree that to the extent BellSouth seeks to recover the costs of Line Conditioning from CLECs, all rates shall conform to Section 252(d)(1) of the Act and FCC rule 51.507(e). 47 C.F.R. § 51.507 BellSouth rejects Level 3's clarification.

ISSUE 2-7 (Attachment 2, Section 2.5.2, page 18): The Parties have been unable to agree on whether BellSouth should remove load coils only on copper loops and sub-loops that are less than 18,000 feet in length. Level 3 submits that because technology is continually improving DSL capabilities, BellSouth should remove load coils on any copper loops under BellSouth ownership or control. BellSouth disagrees.

ISSUE 2-8 (Attachment 2, Section 2.5.4, page 18): The Parties have been unable to agree on whether BellSouth should condition loops by removing bridged tap at TELRIC rates or at BellSouth's tariffed Special Construction rates. Level 3 proposes that BellSouth provide that loop conditioning services according to FCC and Commission orders that require such conditioning be provided at TELRIC rates. BellSouth disagrees.

ISSUE 2-9 (Attachment 2, Section 2.8.2.1, page 21-22): The Parties have been unable to agree on the scope of BellSouth's obligations to offer Unbundled Sub-Loops ("USL") in Multi-Tenant environments ("MTE") and multiunit premises. Level 3 seeks clarification of BellSouth's obligations by proposing language that directly tracts the UNE TRO Order language requiring that ILECs make unbundled subloops for multiunit premises and MTEs available to requesting carriers regardless of the capacity level or type of loop provided to the customer at that premises and without requiring that Level 3 collocate to access that subloop. BellSouth has rejected Level 3's changes. Instead, BellSouth seeks to impose unbundling obligations on Level 3 for intra-building cabling despite the fact that Level 3 has no such obligations under state or federal law, the FCC has already disposed of how that wiring is handled between ILECs and CLECs in its October 2000 Competitive Networks Order.[48]

ISSUE 2-10 (Attachment 2, Section 2.8.3 *passim*, page 23): The Parties cannot agree on BellSouth's obligations to unbundled "network terminating wire" which is wire that BellSouth

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[48] *Promotion of Competitive Networks in Telecommunications Markets, Wireless Communications Association International, Inc., Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network,* First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, 15 F.C.C.R. 22983 (2000) ("*Competitive Networks Order*") (Carriers cannot enter into exclusionary contracts that prevent other carriers from accessing customers located in MTES; MTE owners have the right to relocate the demarcation point for ILEC owned wire to the MPOE. Moreover, inside wire is deregulated and therefore, no commission can exercise jurisdiction over it within the confines of an interconnection agreement.).

contends is unshielded twisted copper wiring that is used to extend circuits from an intra-building network cable terminal or from a building entrance terminal to an individual End User's point of demarcation. Level 3's position is that BellSouth is obligated to unbundle this wire to the demarcation point. BellSouth insists that unbundling requirements should also apply to wire owned by Level 3. Level 3 denies that is has such an obligation.

ISSUE 2-11 (Attachment 2, Sections 2.8.6.3.1, 6.4.3.1 , pages 27, 53): The Parties cannot agree on the extent to which BellSouth should make unbundled dark fiber loops or transport available. Level 3's position is that there should be some reasonable limit on the amount of dark fiber loops or transport in any particular route that BellSouth can reserve to itself for future orders and for maintenance spares. Otherwise, BellSouth can by fiat and without any regulatory oversight, eliminate dark fiber as a UNE by simply reserving 100% of the remaining strands regardless of its actual needs. Level 3 proposed that BellSouth be permitted to reserve up to a maximum of 8% of available fiber loop strands for maintenance and repair purposes. Level 3 also proposes that reservation of dark fiber strands for future orders be limited to a twelve month planning period. BellSouth's position is that there should be no limitation on reserves.

ISSUE 2-12 (Attachment 2, Section 2.9.1.5, page 28): The Parties cannot agree on language dealing with the situation, though remote, where installed equipment of Level 3 allegedly significantly degrades other services. Level 3 has inserted language that tracks and incorporates the process in FCC rule 51.233. 47 C.F.R. § 51.233. BellSouth disagrees.

ISSUE 2-13 (Attachment 2, Section 5.2.6, page 46): The Parties cannot agree on the extent of the charges BellSouth may impose upon Level 3 where BellSouth audits Level 3's orders for Enhanced Extended Links ("EELs"). Level 3 offered to agree to pay for any reasonable and demonstrable charges that BellSouth incurred where an audit revealed

noncompliance with the FCC's rules on EELs usage. BellSouth's position is that there can be no limitation on the charges it may impose upon Level 3 for such audits.

ISSUE 2-14 (Attachment 2, Section 5.4.1, 5,4,2, pages 48): The Parties cannot agree on whether the rates imposed by BellSouth for unbundled network elements made available pursuant to the Agreement and state and federal law should be consistent with Section 251(d)(1) of the Act. Level 3 asserts that Section 251(d)(1) should govern UNE rates. BellSouth disagrees and rejects Level 3's insertion of the qualifying phrase "consistent with Section 251(d)(1) of the Act."

ISSUE 2-15 (Attachment 2, Section 6.1.1.1, page 48): The Parties cannot agree on whether BellSouth's Dedicated Transport should terminate to reverse collocation arrangements within the same LATA. Level 3 asserts that under the FCC's orders, Level 3 may access BellSouth Dedicated Transport that has an endpoint at a BellSouth reverse collocation arrangement. Accordingly, dedicated transport should also terminate to BellSouth collocation arrangements within Level 3 collocation facilities. BellSouth disagrees and rejects Level 3's proposed language.

ISSUE 2-16 (Attachment 2, Section 6.4.3.3, page 54): The Parties cannot agree on whether BellSouth should provide Level 3 with additional information when BellSouth rejects an order for Dark Fiber Transport because BellSouth determines that facilities are not available. Level 3 proposes that BellSouth provide information concerning the reason for rejection, amount of fiber reserved by BellSouth, and information revealing whether additional strands might be made available pursuant to a routine network modification or other means. BellSouth's position is it should not be required to provide any such information.

ISSUE 2-17 (Attachment 2, Section 7.1, page 54): The Parties cannot agree on whether in its description of unbundled databases, BellSouth should include a reference to 911 and E911 databases. Level 3 proposed a sentence requiring that BellSouth provide non-discriminatory access to 911 and E911 databases on an unbundled basis as required by FCC rule 51.319(f). 47 C.F.R. § 51.319. BellSouth believes that no such clarification is necessary.

ATTACHMENT 3 (Interconnection)

ISSUE 3-1 (Attachment 3, Section 4.13.2.1.2): Level 3 has proposed that the language covering routing of Toll Free calls be made mutual. BellSouth disagrees and proposes that the routing language apply only to Level 3.

ATTACHMENT 7 (Billing)

ISSUE 7-1 (Attachment 7, Section 1.2, Page 4): Level 3 proposed language that would set firm dates for the receipt of information from BellSouth concerning account setup. BellSouth added language that would require Level 3 to use only an existing Master Account in order to avoid submitting an additional application before placing orders under the new agreement.

ISSUE 7-2 (Attachment 7, Sections 1.2.2 and 1.3, Pages 4-5): Level 3 proposed language that would make the payment responsibility portion of the agreement reciprocal. Level 3 also added text that would require payment only of "undisputed charges." BellSouth's proposed text would remove the language establishing reciprocity and would also strike any reference to "undisputed" charges such that Level 3 would be required to pay BellSouth those charges it disputes.

ISSUE 7-3 (Attachment 7, Section 1.5, Page 5): Level 3 proposes to make the language concerning verification of tax exemption status reciprocal. BellSouth disagrees.

ISSUE 7-4 (Attachment 7, Section 1.6, Page 6): Level 3 proposes to make the late payment language reciprocal and to have late charges apply only to undisputed portions of a bill. Level 3 added text that would calculate the late factor assessed by Level 3 on BellSouth according to Level 3's intrastate access tariff. BellSouth rejects Level 3's proposed revisions to this section.

ISSUE 7-5 (Attachment 7, Sections 1.7.1, Page 6): Level 3 proposes a number of revisions that would restrict BellSouth's ability to suspend or terminate service to Level 3. First, Level 3 proposes that BellSouth provide a minimum of 7 days' prior written notice before suspending or disconnecting service for alleged improper or illegal use of BellSouth's facilities. Second, Level 3's language allows for cure within the 7 day notice period allowing Level 3 to avoid suspension or disconnection. BellSouth disagrees with Level 3's proposal.

ISSUE 7-6 (Attachment 7, Sections 1.7.2, Pages 6-7): When service would be suspended due to non-payment, Level 3 proposes to extend the effective date of suspension or termination of service based on notice of such non-payment from 15 to 30 days or whatever the applicable timeframe is established by state commissions for disconnecting customers. Level 3 also added the qualifier that suspension or termination for nonpayment of services would be limited to undisputed amounts. Level 3 also proposes to reserve the right to avoid suspension or disconnection if the Company cures the nonpayment of undisputed amounts within 30 days. BellSouth disagrees.

ISSUE 7-7 (Attachment 7, Section 2.2, Pages 9-10): Level 3 proposes that a Party may withhold disputed amounts until the dispute is resolved and that the billed Party is absolved of any liability for associated late charges if the dispute it ultimately settled in its favor. BellSouth disagrees with Level 3's proposals and proposes ambiguous language about following "normal

treatment procedures" and resolving disputes in accordance with Section 2. Level 3 rejects BellSouth's proposals as vague and ambiguous.

ISSUE 7-8 (Attachment 7, Section 2.3, Page 10): BellSouth has deleted language that would set the late payment charge according to Section 1.6 of Attachment 7. BellSouth prefers instead to reference a number of different tariffs and to remain silent on what late factor Level 3 would apply to any delinquent BellSouth bills. BellSouth struck Level 3's language that would restrict BellSouth's ability to assess interest on late payment charges to only those states where it has the authority to do so pursuant to tariff. Also, BellSouth has stricken language that would provide for a credit plus interest of the payment of any disputed charges where the disputing party prevails.

ISSUE 7-9 (Attachment 7, Section 3.4, Page 11): The parties disagree as to the timeframe for providing information necessary to establish a unique hosted RAO code. Level 3 proposes a six (6) week timeframe while BellSouth proposes eight (8) weeks.

ISSUE 7-10 (Attachment 7, Section 3.15, Pages 12-13): Level 3 included language that would require BellSouth to process the conforming portion of EMI data in the event that some of the data cannot be processed due to uncorrectable errors. It is unclear what BellSouth's position is on this issue.

ISSUE 7-11 (Attachment 7, Sections 4.6, 5.5 and 6.6, Pages 14, 17, 19): Level 3 has added language that would require BellSouth to work with Level 3 to determine the source of significant volumes of errored messages in certain usage files that are necessary for Level 3 to accurately issue bills. BellSouth has deleted Level 3's proposed language.

ATTACHMENT 11 (Bona Fide Request)

ISSUE 11-1 (Attachment 11, Sections 1.1, 1.1.1, 1.1.2, 1.2 and 1.9, pages 1 and 4): The Parties have not been able to agree upon language that covers instances when, through FCC or Commission generic orders or prior provisioning, BellSouth is required to offer various network elements and options that are not already covered in this Agreement. Additionally, the Parties have not been able to agree upon language to utilize previous information on BFRs to expedite the process and reduce costs related to Development Rates or Complex Evaluation Fees. Level 3 has proposed language, and BellSouth has rejected the language, along with any references to the proposal, in their entirety.

ISSUE 11-2 (Attachment 11, Section 1.3, page 2): The Parties have not been able to agree upon language to ensure that BellSouth understands the BFR that Level 3 has submitted, and to inform Level 3 if similar requests have been submitted by other parties. BellSouth has rejected Level 3's proposal.

ISSUE 11-3 (Attachment 11, Sections 1.5, 1.6 and 1.10, pages 2-4): Level 3 struck language that limits preliminary analyses' results to those elements and options not ordered by the FCC or Commission. BellSouth wishes to keep the stricken language.

Issue 11-4 (Attachment 11, Section 1.9, page 4): Level 3 has struck a "notwithstanding" provision that details BellSouth's proposal of firm rates and an implementation plan. BellSouth wishes to keep the stricken language.

ISSUE 11-5 (Attachment 11, Sections 1.10 and 1.12, pages 4 and 5): The Parties have not agreed upon language that reserves Level 3's rights to pursue dispute resolution in accordance with the Agreement on any aspect of the BFR, including costs. Level 3 also proposed language guaranteeing that BellSouth will process a BFR regardless of a dispute. BellSouth rejected Level 3's proposed language.

VI. CONCLUSION

For the reasons outlined above, Level 3 respectfully requests that the Commission arbitrate the unresolved issues described above and resolve them in Level 3's favor. Level 3's contract proposals are consistent with the law and commercially reasonable. Level 3 requests that the Commission adopt its contract language contained in Exhibit B.

Respectfully submitted,

LEVEL 3 COMMUNICATIONS, LLC

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Dated: February 13, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on February 13, 2004, a copy of the foregoing Petition of Level 3 Communications, LLC for Arbitration was served by causing it to be hand-delivered on counsel of record as follows:

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